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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, *Petitioner*

v.

STATE OF ALASKA, *Respondent*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATE OF ALASKA, RESPONDENT

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BRIEF OF THE STATE OF ALASKA, RESPONDENT

OPINIONS BELOW ANALYZED

The United States correctly states that this case involves the question of whether the disputed area of Cook Inlet is historic inland waters. If so, the lower Courts correctly held that the State of Alaska has the exclusive right to the subsurface resources therein, pursuant to the Submerged Lands Act of 1953, 43 U.S.C. §1312, Sections 2(c) & 4.

The United States also correctly states the three legal criteria to be applied in deciding the basic question: (1) the exercise of authority or sovereignty over the disputed area by United States, its predecessor and Alaska; (2) the continuity of the exercise of that authority; and

(3) the attitude of foreign nations toward the exercise of authority.

As the case comes before this Court it has assumed an unusual and exceptionally narrow posture. This is so because the parties are in apparent agreement as to the general principles of law and the facts—a state of affairs that does not ordinarily lead to controversy and rarely to the need for final adjudication by this Court. During the course of a lengthy trial, the District Court heard the live testimony of numerous witnesses, considered some 36 depositions, and studied hundreds of exhibits. Thereafter the Court made one hundred eleven Findings of Fact which are unusually detailed, which refer to the specific evidence in the record upon which the Court relied, and which must be carefully studied for a fair summary of the case.

As to these one hundred eleven Findings of Fact, the United States has stated: "We accept the findings of fact of the district court." (Petitioner's Brief, p. 35, n. 35) (Also Petitioner's Brief, pp. 4, 21, 22) While it does not accept the lower Court's conclusions as to the importance of these facts, the United States has also conceded that "there is room for argument about the inferences to be drawn from the historic record." (Petitioner's Brief, p. 27) Under the circumstances it is the contention of Alaska that the case now requires only the application of traditional and long recognized principles of appellate review. The Court of Appeals agreed.

In considering the case, the Court of Appeals took note of this Court's decision in *Louisiana* (394 U.S. at 75), and recognized that the application of the legal principles of historic inland waters "raises primarily factual

questions" which is the task of the fact finder—in this case the District Court and in the *California* case the Special Master, 381 U.S. 139 (1965). Contrary to the United States' view, we believe this is a case in which this Court should follow the rule barring review of "concurrent findings of fact by two courts below in the absence of a *very obvious and exceptional showing of error.*" *Graver Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 274, 275 (1949). (Emphasis added) The United States has failed to show a very obvious and exceptional error, if indeed it has shown any error at all.

QUESTIONS PRESENTED

The State of Alaska cannot accept the phrasing of the questions in the United States' brief. (pp. 2-3) As the questions are presented, the United States has inserted self-serving factual assumptions which go to the heart of the case, and which are contrary to the facts (now agreed upon) found by the District Court on the issues of sovereignty, continuity, and acquiescence by foreign nations. For example, the first question posed by the United States assumes "the absence of any explicit claim to Cook Inlet as inland waters or of any sovereign acts interfering with the navigational rights of foreign nations to innocent passage therein" and then inquires in substance whether there has been a sufficient exercise of sovereignty over Cook Inlet. These assumptions are contrary to numerous fact findings. By way of illustration consider the following:

> "The State of Alaska has produced evidence, hereinafter referred to in subsequent Findings, which establishes clear beyond doubt that there has been an exercise of sovereignty over Cook Inlet by govern-

ments whose nationals have inhabited its shores sufficient to justify the status of the disputed area of Cook Inlet as an historic inland water bay of the United States and now of Alaska." (Finding 16) (Pet. App. C, p. 25a)

* * *

"The continuous patrolling of Cook Inlet and enforcement by agents of the United States of Acts and regulations throughout all of Cook Inlet was open, apparent, and visible to all—United States nationals and foreigners alike—who may have taken occasion to examine the conditions existing in Cook Inlet. These were deeds—and not merely proclamations—by which the intent of the United States to exercise sovereignty was clearly expressed." (Finding 47) (Pet. App. C, p. 32a)

* * *

"Cook Inlet is not and has never been a waterway for intercourse between nations. (Exhibits B through I, K)" (Finding 10) (Pet. App. C, p. 23a)

The second question as presented by the United States assumes "the absence of positive approval or affirmative acquiescence by foreign nations in any exercise of sovereignty over the waters of Cook Inlet", whereas the District Court found:

> "Foreign nations have tolerated and acquiesced in such exercise of sovereignty over Cook Inlet." (Finding 92) (Pet. App. C, p. 43a)

The last question presented by the United States inquires in substance as to whether the "clearly erroneous" test governed appellate review of the District Court's resolution of law questions. This is obviously a straw man approach, inasmuch as Alaska has never contended and

does not now contend that the "clearly erroneous" rule applies to law questions. The test, we do contend, governs appellate review of factual findings.

From Alaska's viewpoint a more fair statement of the principal issues to which this Court's attention should be directed is:

(1) Whether the Court of Appeals correctly applied the "clearly erroneous" test in its review of the District Court's fact findings that, among others, the State of Alaska has proved "clear beyond doubt that there has been an exercise of sovereignty over Cook Inlet . . . sufficient to justify the status of the disputed area of Cook Inlet as an historic inland water bay of the United States and now of Alaska"; that "the exercise of (such) sovereignty . . . has continued for such period of time as to have developed into a usage"; and that "foreign nations have tolerated and acquiesced in such exercise of sovereignty over Cook Inlet."

The other issues presented are subsidiary to the first issue:

(2) Whether a necessary prerequisite to the status of Cook Inlet as historic inland waters is proof of interference with innocent passage of foreign vessels; and

(3) Whether the trial court applied the correct standard of proof in light of the so-called disclaimers of jurisdiction over Cook Inlet by the United States.

STATEMENT OF THE CASE

Alaska cannot accept the United States' summary statement or numerous other factual statements that appear throughout its brief. Undoubtedly through inadvertence or

perhaps due to an unfamiliarity with the whole record, the Government's brief contains significant misstatements of fact in some instances and important omissions in other instances.

At this point we wish to point out a few of the more glaring examples. In discussing the Gharrett-Scudder charts, the Government states that these charts were transmitted to Canada with a disclaimer stating that they were not intended to enlarge or extend territorial waters in a legal and jurisdictional sense. (Govt. brief pp. 16-17) Such disclaimer, if actually sent, would admittedly be a most important bit of evidence and might seriously undermine the relevancy of the Gharrett-Scudder charts. As we view the record, however, it simply does not support the assertion that any such disclaimer was actually sent to Canada. It is true that internally some consideration was given by Government employees to the sending of such disclaimer but the actual letter of transmittal, as we will subsequently demonstrate, contained no such language.[1]

Throughout the Government's brief there is left the impression that foreign vessels, particularly Canadian ships, have fished in Cook Inlet for decades without interruption (Govt. brief pp. 52, 24, 13); and even that the frequent and unmolested voyage of Canadian vessels in Cook Inlet outnumbered the incidents of exercise of sovereignty beyond the three-mile limit. (Govt. brief p. 45, n. 47) These assertions fly in the teeth of the District Court's undisputed findings that:

> "Although, undoubtedly, the United States has made an exhaustive study of its records, it has only been

1. State Ex. IE 4 through IE 10, Tr. 413-415.

> able to offer evidence—inconclusive and disputed—which, if believed, would show only a few isolated intrusions of Canadian halibut vessels inside Cook Inlet, at least one of which was within the territorial sea of Cook Inlet. (Exhibits 78, 78A, 80; Hodgson's depos., Exhibit 5; Costello's depos., pp. 29-31)
>
> The number of such Canadian halibut vessels has been so small as to be *de-minimis*—particularly so when there is considered: (a) there were possibly only two undetected such occurrences before Alaskan statehood; (b) afterwards only five Canadian vessels have fished for halibut in Cook Inlet, none of which were detected by state law enforcement officials; (c) the time in question goes back more than sixty-six years; (d) never has there been any other foreign fishing activity, such as, for salmon or other species; . . ." (Findings 100 and 101) (Pet. App. C, p. 44a)

The Government refers to and quotes from a memorandum of the National Director (Albert Day) of the United States Fish and Wildlife Service, concurring in the opinion of the Solicitor of the Department of Interior. (Govt. brief p. 14) The Government, however, omits a most significant part of that memorandum and when the memorandum is read in its totality, it does not support the Government's argument, but confirms Alaska's position. This is made even more evident when his deposition testimony is considered. We shall also deal with this in subsequent portions of the brief.

We point out the foregoing matters, not for the purpose of belaboring distinguished opposing counsel but to invite the Court to study carefully the District Court's extensive findings of fact with which the Government now agrees and which contain a complete summary of the factual matters dealt with below.

SUMMARY OF ARGUMENT

1. *Sovereignty.* Applying the principles of law heretofore recognized by this Court and enunciated in the *Juridical Regime of Historic Waters, Including Historic Bays,* United Nations Secretariat A/CN, 4/143 (1962) the District Court addressed itself to the factual issues and properly found all of Cook Inlet to be inland waters. Specifically, it made factual findings, now accepted by the United States, that there has been a sufficient and continuous exercise of sovereignty over Cook Inlet so as to establish title to Cook Inlet as historic inland waters. Whatever significance or lack thereof, is to be accorded Russia's claim and control of Cook Inlet, the United States intensified the claim when it acquired Alaska. For the greater part of 92 years—from the time it acquired Alaska from Russia in 1867 to 1959 when Alaska gained statehood—the United States has made explicit claims to Cook Inlet through judicial decision, legislative acts, an executive proclamation and executive regulations. Those claims have been enforced by officials of the United States Government throughout all of Cook Inlet by the seizure of vessels and the arrest of individuals as well as by numerous boardings and continuous patrols.

The Government's argument that action was asserted only against American citizens—and therefore irrelevant —is erroneous, both factually and legally. As a matter of fact, a specific claim of United States sovereignty over Cook Inlet was made to Canada, when at Canada's request the Department of State transmitted without reservation, charts to Canadian fishing officials depicting the baseline along Alaska's coast for the purpose of measuring the three-mile limit for fishery regulation. A specific claim of Alaskan sovereignty over Cook Inlet was made to Japan

when offiicials of Alaska seized the Japanese fishing vessel, BANSHU MARU, shortly after it had passed through Cook Inlet and obtained a promise from the Japanese not to fish in Cook Inlet thereafter. The only reason Alaska did not arrest and seize the Japanese vessels in Cook Inlet is because it did not catch up with them until they anchored in the neighboring waters of Shelikof Strait. And the Government has properly recognized that the seizures, arrests and indictments were "indisputably an act of sovereignty directed at foreign nationals." (Govt. brief p. 46)

From a legal standpoint, however, according to the *Juridical Regime,* neither the United States nor Alaska had to take enforcement action against foreigners where their relevant laws and regulations, widely publicized and openly enforced, were respected. Under the fact findings by the trial court, now agreed to by the Government, there were no detected instances of foreign intrusions into the waters of Cook Inlet—except for the seized Japanese vessels—and hence the United States did not have to resort to particular acts of enforcement.

Contrary to the Government's assertion, there is no requirement that in order to establish historic title over inland water, there must be proof of interference with the navigational rights of foreign nations. The authorities on the subject of sovereignty all agree simply that action need only be taken under the municipal law of the claiming state, sufficient to maintain its claim.

2. *Continuity.* The District Court made six fact findings (86-91, Incl.), now also accepted by the Government, with regard to the continuity of the exercise of sovereignty. Typical of these is Fact Finding 86:

> "The exercise of sovereignty over Cook Inlet, the nature of which is indicated in the foregoing Findings, has continued for such period of time as to have developed into a usage. (Record as a whole)"

In apparent contradiction of its acceptance of the lower court's findings, the Government argues that the continuity was interrupted by periodic incursions of foreign fishing vessels who fished unmolested in Cook Inlet. This is simply not supported by the record, by the undisputed evidence, or by other accepted findings hereinabove noted.

3. *Acquiescence.* As noted, the United States at Canada's request, sent it the Gharrett-Scudder line charts which included all of Cook Inlet within the baseline for measurement of the territorial sea for fisheries regulation. Canada accepted the line without protest. In these circumstances Canada's action constitutes "acquiescence" as that term is employed in historic bay cases.

Even though Japan made one protest shortly after the 1962 arrests and seizures in Shelikof Strait, it has recognized Alaska's claim to Cook Inlet by not fishing therein any time since. This is in sharp contrast with the fact of Japanese fishing in other waters near Alaskan shores.

The claim of the United States and Alaska to Cook Inlet has been respected by all other foreign nations since no vessels of any such nations have fished in Cook Inlet or otherwise interfered with the sovereignty of the United States and Alaska over Cook Inlet. None has protested the claim to Cook Inlet as an historic inland bay by the United States and Alaska.

4. *Cook Inlet is not a historic territorial sea.* Having accepted in their entirety the trial court's extensive findings and expressing no disagreement with this and the lower court's adherence to the three legal requirements for the emergence of historic title, the Government is left with only one argument. It is that the sovereignty exercised over Cook Inlet was sovereignty over Cook Inlet as a territorial sea. The argument is bottomed upon an incorrect understanding of the factual record and a claim that there was no showing of interference with the innocent passage of foreign vessels in the waters of Cook Inlet.[2] The Government's only legal authority is believed to be an erroneous interpretation of a footnote reference by this Court in *Louisiana,* 394 U.S. at 24, n. 28, to a conceivable historic territorial sea.

The Government's argument, we believe, is erroneous —not only factually but also legally and for a variety of reasons. The dominant opinion, as noted in the *Juridical Regime,* is that historic bays, the coasts of which belong to a single nation or state, are internal or inland waters.

Article 7 of the Convention on the Territorial Sea and Contiguous Zone defines the baseline for the measurement of territorial sea from a line across the mouths of or within bays. Waters inside the defined line are inland waters. Accordingly, the only sensible meaning of Section 6 of Article 7 (the exception of historic bays) is that a baseline drawn across the entrance points of a historic bay also encloses inland waters.

The authorities, heretofore relied upon by this Court and the Government, are not in accord with the Government's argument. Both the *Juridical Regime* and the Mem-

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2. This argument, it would appear, flies in the teeth of the Government's acceptance of Fact Finding 10: "Cook Inlet is not and has never been a waterway for intercourse between nations. (Exhibits B through I, K)" (Pet. App. C, p. 23a)

orandum on *Historic Bays* decline to denote any one specially required act of sovereignty.

Although the record is largely silent on the point, it may be conceded that foreign vessels pass through Cook Inlet en route to Anchorage. But this proves nothing, because the interests of free international commerce have brought about an international custom that permits the free passage of foreign vessels through inland waters en route to harbors and ports.

5. *The Burden of Proof, Disclaimers and Foreign Relations.* The trial court imposed upon Alaska the burden of proving the historic claim to Cook Inlet by evidence "clear beyond doubt." This was done at the insistence of the Government that a more rigorous standard of proof was required in the face of disclaimers by the Government. Since the trial court accepted the Government's viewpoint, albeit with some misgivings, it is difficult now to understand the Government's argument that the court erred.

The Government argues now, as it did in the lower courts, that the conduct of foreign relations falls exclusively within the domain of the Executive and Legislative Branches of the Government. With this general proposition neither Alaska, the District Court nor the Court of Appeals disagreed. And also Alaska recognizes, as did the lower courts, that the Government has traditionally announced, as a matter of national policy, that the territorial sea should be limited to a width of three miles. And in the light of the language of Section 2(c) of the Submerged Lands Act of 1953, 43 U.S.C. §1301(c), it is agreed that the three miles is to be measured from "the line marking the seaward limit of inland waters."

But there is no presumption that the Government's traditional adherence to the three mile rule overrides equally well established principles of law with regard to historic bays. Where, as in this case, Alaska has succeeded in proving, clear beyond doubt, the historic claim to Cook Inlet as inland waters, this Court has heretofore held—and with manifest fairness—that the Government cannot distort its exclusive power over the conduct of foreign relations so as to ignore past events, take away an internal state's territory, and thereby claim for the National Government the ownership of valuable natural resources.

The foregoing five points will be developed in Parts One through Five in the following argument.

ARGUMENT

PART ONE

COOK INLET IS AN HISTORIC INLAND WATER BAY

The Court of Appeals decided that the District Court correctly applied the three-pronged test, noted above, adopted by this Court for resolving the question of the status of Cook Inlet as an historic bay.

The District Court also recognized that certain modifications have been imposed by this Court upon the principles of international law used in the determination of historic waters. We can best summarize these modifications by quoting from the District Court's opinion. The Court stated:

"The first modification pertains to the vantage point to be assumed by a court in judging the facts concerning the status of a bay as historic waters. In *United States v. Louisiana,* 304 U.S., at 77, the Court indicated that such a controversy should be viewed as if the claim were being made by the United States and opposed by another nation.

The second modification concerns the degree to which a coastal state may rely on its own assertions of sovereignty over disputed waters to establish historic title. In *United States v. Louisiana, Id.* the Court made clear that state exercises of dominion, as distinguished from federal assertions of sovereignty, may properly be considered on the issue of historic title.

The third modification pertains to the legal effect of a disclaimer by the United States that disputed waters are historic waters. In *United States v. California,* 381 U.S. at 175, the Court ruled that a disclaimer by the United States was decisive in view of the 'questionable evidence of continuous and exclusive assertions of dominion over the disputed waters.'

But the Court also stated at that point:

> 'We are reluctant to hold that such a disclaimer would be decisive in all circumstances, for a case might arise in which the historic evidence was clear beyond doubt.' Id.

In *United States v. Louisiana,* 394 U.S. at 77 the Court elaborated on its position by stating:

> '[I]t would be inequitable in adapting the principles of international law to the resolution of a domestic controversy, to permit the National Government to distort those principles, in the name of its power over foreign relations and external affairs, by denying any effect of past events.'

In a footnote to that excerpt, the Court further limited the legal effect of a disclaimer:

> 'It is one thing to say that the United States should not be required to take the novel, affirmative step of adding to its territory by drawing straight baselines. It would be quite another to allow the United States to prevent recognition of a historic title which may already have ripened because of past events but which is called into question for the first time in a domestic lawsuit. The latter, we believe, would approach an impermissible contraction of territory against which we cautioned in *United States v. California.* Id.' " (Pet. App. B, pp. 11a-12a)

As will be demonstrated in this brief, the Government's arguments, carefully analyzed, fly in the face of the above-quoted limitations imposed by this Court in these cases, and in particular do indeed call for an impermissible contraction of Alaska's territory.

THE COURTS BELOW PROPERLY FOUND UPON UNCONTRADICTED AND AMPLE EVIDENCE THAT SOVEREIGNTY WAS EXERCISED OVER COOK INLET AS INLAND WATERS.

A. THE FACTUAL RECORD PERTAINING TO SOVEREIGNTY.

1. Geographic and Economic Characteristics of Cook Inlet.

Among those water areas dealt with in the tideland cases, Cook Inlet is unique. As a clearly defined, well-

marked indentation, Cook Inlet is completely surrounded by the lands of Alaska so that it contains landlocked waters and geographically resembles a large inland lake. (Findings 1-8, incl.) (Pet. App. C, pp. 22a-23a) It is well marked by prominent headlands, inside of which, so the undisputed evidence showed, a mariner instinctively feels himself within the jurisdiction and domain of Alaska. (Finding 11) (Pet. App. C, pp. 23a-24a)[3] From the beginning of recorded history, according to the testimony of three other distinguished experts,[4] Cook Inlet has been vital to the economic interest and well-being of those persons inhabiting its shores; first, because of the fur trade, then fishing, and more recently, mining and petroleum activity. It has never been a waterway for intercourse between nations, but, on the contrary, all of Cook Inlet's waters have been and are such that at all times they have been easily patrolled and protected by the government entity which controlled its shores. (Finding 13) (Pet. App. C, p. 24a)

While these facts clearly distinguish Cook Inlet from those waters involved in other submerged lands cases, Alaska does not contend that standing alone they are sufficient to satisfy the three controlling criteria for the

3. Mitchel P. Strohl, currently the registrar and lecturer in political science at the American College in Paris, France, and formerly a Commander in the United States Navy, retiring after 22 years of active service, testified as follows:

"Q. All right, Professor, would you state what the reasons are for your opinion [that Cook Inlet is a necessarily inland body of water]?

A. I think, sir, that these fall into about six categories: The configuration of the shore; secondly, the concept of a landlocked body; third, the matter of entry, then the category of tides; fifth, this would be the weather, and finally, the navigation aids, I think about in that order." (A. 89; Tr. 465)

4. Two historians and an economist. *Infra*, pp. 17 and 44.

establishment of an historic bay. But neither are these facts irrelevant.[5] They led the trial court to find—and properly so—that the geographic and economic characteristics of Cook Inlet are such that it would have been unnatural had not the inhabitants of its shores, with the acquiescence of foreign nations, exercised continuous sovereignty over its shores and waters from the earliest times forward. (Finding 4) (Pet. App. C, p. 22a) And the Court further found, upon ample evidence that, had not the Cook Inlet fisheries been so controlled, the citizens of the United States and Alaska would have suffered disastrous effects through the loss and dissipation of these valuable fisheries. (Finding 14) (Pet. App. C, p. 24a)

2. Russian Sovereignty.

The trial court received the testimony of two distinguished historians, Mr. Robert DeArmond and Dr. William Hunt, not only with reference to claims of sovereignty by the United States and the State of Alaska over Cook Inlet, but also with regard to the rather intensive Russian activity in Cook Inlet prior to the Treaty of Cessions. (DeArmond Testimony A. 113; Tr. 520; Hunt Testimony A. 93; Tr. 474) We do not claim that the Emperor's Ukase of 1821, forbidding the approach of vessels within 100 Italian miles of the Alaska coastline, was valid or fully enforceable. We also concede that the

5. This Court in *United States v. Louisiana*, 394 U.S. 11, 23 (1969) recognized the importance of geographical features. The Court said:

"Certain shoreline configurations have been deemed to confine bodies of water, such as bays, which are necessarily inland."

See also State Ex.N (Tr. 438) and O (Tr. 439) where Delaware Bay and Chesapeake Bay were found to be historic inland waters of the United States in part on the basis of geographical features similar to those found to exist by the District Court in this case.

United States and other nations promptly protested the Ukase. This does not take away or minimize Russia's intense activity throughout Cook Inlet. But Alaska need not base, and does not base, its claim to Cook Inlet solely on the basis of the exercise of Russian sovereignty. What is far more important is the exercise of United States sovereignty over Cook Inlet after it acquired Alaska.

3. United States Sovereignty, Regulations, Statutes, Proclamations and Acts of Enforcement.

Before discussing the manner by which the United States exercised sovereignty over Cook Inlet, some preliminary comments on the Government's arguments are necessary. First, among other things, the Government relies on an alleged absence of an explicit declaration, executive or legislative, that Cook Inlet is inland waters. (Pet. Br. p. 39) The United States argues that absent such an explicit declaration the decisions of the courts below will usurp the traditional role of the executive in formulating the policy of the United States relating to maritime boundaries. The Government argues that the United States has traditionally attempted to limit national claims to the world's oceans. (Pet. Br. p. 33) The United States argues further that because of its policy, the various legislative acts relied upon by Alaska and the regulations and actions promulgated and taken thereunder must be construed to indicate an assertion of jurisdiction only over the area of Cook Inlet within three miles of the coastline. (Pet. Br. p. 9 fn)[6]

6. Recognizing the weakness of this argument, the Government further argues that even if there were an application of these Acts over all of Cook Inlet, it was an assertion of jurisdiction over Cook Inlet as territorial sea, not inland water. This will be discussed *infra* pp. 51-55.

The foregoing argument is erroneous for at least two reasons. *First,* while it is true that the three-mile limit has been a cornerstone of the United States' position in international law, it is likewise true that the doctrine of historic bays has been equally ingrained. Witness, for example, such bays as Delaware Bay and Chesapeake Bay,[7] traditionally claimed and recognized as United States historic bays, and even more recently, Long Island Sound.

Thus, there are two co-existing and well established doctrines of law—the three-mile limit and historic bay doctrines. When the United States seizes upon the first doctrine to the exclusion of the second, it assumes the point at issue, to wit: that waters beyond three miles from the Cook Inlet coastline were not claimed as an inland bay. The fallacy of such reasoning is at once obvious.

Second, the argument will not withstand close historic scrutiny. The United States argues that the language of the various statutes and proclamations (The Alien Fishing Act, The White Act and The Southwestern Alaska Fisheries Reservation) are not express assertions of sovereignty over all of Cook Inlet because the language therein, such as "waters of Alaska under the jurisdiction of the United States" is not clearly an assertion of jurisdiction. This brings us to the fundamental question: Was jurisdiction (or sovereignty) asserted by the United States over Cook Inlet as *waters of Alaska?* Put another way, the question

7. At the present time, applying the principles of the Convention on Territorial Seas and Contiguous Zones, both Delaware Bay and Chesapeake Bay would be recognized as juridical bays. But long before such Convention was held, they were recognized as historic inland bays notwithstanding the foreign policy then enunciated by the United States. (See 1 Op. A.G. 32 (1852); State Ex. N; Tr. 438; *Stetson v. U. S.,* No. 3993, Class 1 (2d Court of Commissioners of Alabama Claims; State Ex. O; Tr. 439)

is: Were the waters of Cook Inlet claimed by the United States as "waters of Alaska under the jurisdiction of the United States?" To answer the question, it is necessary to trace the history of various statutes that have been enacted with respect to the waters of Alaska. It is necessary also to depict the claims to Cook Inlet at the time each statute and regulation was promulgated in the light of the evidence in this case.

At the outset, the rights of Russia as to its jurisdiction and sovereignty in Cook Inlet passed unimpaired to the United States at the time of the Treaty of Cession in 1867. (Finding 22) (Pet. App. C, p. 26a) The United States thereafter accelerated and augmented the exercise of sovereignty over all of Cook Inlet. The principal area of United States' concern was in the management and control of Cook Inlet's fisheries so as to avoid their dissipation and consequent economic disaster to American citizens.

(a) Revised Statute 1956 and the Kodiak case.

The fact of United States' jurisdiction over all of Cook Inlet was first determined judicially when the United States District Court of the District of Alaska upon the urging of the Justice Department held that the arrest of the vessel KODIAK was an assertion by the United States of territorial jurisdiction over Cook Inlet. (*The Kodiak*, 53 Fed. 126 (1892)) The Revenue cutter MOHICAN arrested the KODIAK and two other vessels, the LETTIE and JENNIE for alleged violations of R.S. 1956. That statute provided that no person shall kill otter or other fur bearing animals "within the limits of Alaska Territory or in the waters thereof." Thus it was that the Court in the *Kodiak* case was faced with the same contention now

urged by the United States, to wit: that since the defendant had allegedly killed fur bearing animals more than three miles from the shoreline of Cook Inlet, the statute was not applicable because the phrase "in the waters thereof" should be construed to mean a distance not exceeding three miles from the shore of Cook Inlet. As we see it, this is precisely the contention now urged by the United States. The Court said:

> "The contention is not a valid one.
>
> * * *
>
> . . . it can hardly be claimed that any portion of Cook's Inlet is 'high seas', within the accepted meaning of the phrase, for it is well landlocked by islands extending from Kodiak Island to Cape Elizabeth, on the east, and can only be entered by coming in near some of these islands, or by the way of Shelikof straits. (53 Fed., p. 128)"

The Court, it will be noted, recognized a fundamental geographical distinction between Cook Inlet and areas such as the Bering Sea (see *Whitelaw v. U. S.*, 75 Fed. 513 (9th Cir. 1896) and the open Gulf of Alaska (see *Pacific Trading v. U.S.*, 75 Fed. 519 (9th Cir. 1896))[8]

Having taken the unique geographical status of Cook Inlet into consideration, the Court made clear that its basis for deciding that the United States exercised jurisdiction rested upon assertions of sovereignty over Cook Inlet by the United States:

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8. The Government relies on *Whitelaw* and *Pacific Trading* in support of its argument that R.S. 1956 did not apply in areas more than three miles from shore. (Pet. Br. pp. 8-9) Since those cases applied to the Bering Sea and the open Gulf of Alaska respectively, they have no application to "landlocked" Cook Inlet.

> "National dominion and sovereignty may be extended over the sea as well as over the land, and in our government, when Congress and the President assert dominion and sovereignty over any portion of the sea, or over any body of water, the Courts are bound by it." (53 Fed. p. 130)

The quoted language of the Court in *Kodiak* is simply a paraphrasing of the requirement that, in the emergence of historic title to inland waters, there must be an assertion of jurisdiction or sovereignty by the claiming nation —a principle of law which no one, including the United States, would contend has been overruled.

In further attacking the *Kodiak* decision, the United States has argued the KODIAK was an American vessel and its seizure was not an act effective upon foreign nationals (Pet. Br., p. 7). In so arguing, the United States misses the point of the *Kodiak* case. Obviously, neither a United States citizen nor an alien can be convicted of a statutory violation unless he comes within the ambit of the statute. In the *Kodiak* case the statute, as we have seen, prohibited any person killing fur bearing animals "within the limits of Alaska territory, or the waters thereof." If the defendant, whether he be American citizen or alien, had taken the fur bearing animals outside the waters of Alaska, he obviously would not have violated the statute. This necessarily led the Court in the *Kodiak* case to a determination of the limits of the waters of Alaska, a decision which, in the light of the express wording of the statute, was an essential finding in determining the guilt or innocence of the defendant, irrespective of his nationality. Thus, the Court's decision that all of Cook Inlet was within the national dominion and sovereignty of the United States was just as clear an assertion of sov-

ereignty by the Executive and Legislative Branches of our Government as if the indictment had been brought against a foreigner. The point was expressly made in *Whitelaw v. U. S.*, 75 Fed. 513 (9th Cir. 1896). There R. S. 1956, insofar as the Bering Sea was concerned, had been amended so as "to include and apply to all of the dominion of the United States in the waters of the Bering Sea; . . .," (75 Fed. 513, 515). Against the Government's argument that this statute could reach American citizens even on the high seas, the Court stated:

> "These questions have no bearing as to the interpretation to be given to the statutes under review. These statutes, whatever their interpretation may be, must be applied to citizens and subjects of all nations, and were not intended to apply only to citizens, subjects, and vessels of America." (75 Fed., p. 518)

Hence, the statute was operative against aliens and citizens alike in waters over which the United States had jurisdiction.

The Court's decision in the *Kodiak* case was well publicized, both in newspapers and official reports; and the then Attorney General of the United States, expressly informed of the decision obviously agreed with the decision and the action taken.[9] (State Ex. BV; Tr. 380) Moreover, the decision of the District Court in the *Kodiak* case was adhered to the following year when two vessels, the OLGA and MARY ANDERSON, were boarded for alleged similar violations in the disputed area of Cook Inlet. (Findings 23-30) (Pet. App. C, pp. 25a-28a)

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9. The Government overlooks this fact when it states that the decision received no further public notoriety other than the published newspaper reports. (Pet. Br. p. 7)

(b) The Alien Fishing Act.

With the precedent of the *Kodiak* case before it—a clear-cut judicial holding that Cook Inlet was water over which the United States had asserted jurisdiction—Congress enacted the Alien Fishing Act in 1906. This Act prohibited aliens from fishing in waters of Alaska under the jurisdiction of the United States.[10] There can be no doubt that the earlier arrests demonstrated that the waters of all of Cook Inlet were waters under the jurisdiction of the United States subject to the Alien Fishing Act and therefore waters from which aliens were excluded. In fact, with such a clear precedent immediately before it, it cannot be seriously argued that the Congress did not or could not have taken the *Kodiak* precedent into account when, on two occasions, 1906 and 1924, it enacted significant legislation affecting Cook Inlet.

From the time of the passage of the Alien Fishing Act and up through the time of Alaska Statehood when the State of Alaska assumed control of Alaska's fisheries, all waters of Cook Inlet inside a line drawn from Point Gore through the Barren Islands to Cape Douglas, as well as the adjacent territorial sea, were patrolled for the purpose of enforcing the Alien Fishing Act. Thus, the effect of the Act was to exclude aliens both from fishing within the inland waters of Cook Inlet inside a line drawn from Point Gore to Cape Douglas, and from fishing within the territorial sea three miles seaward of that line. (Findings 31-34) (Pet. App. C, p. 28a)

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10. The operative words of R.S. 1956, the Alien Fishing Act, and The White Act are strikingly similar. Hence R.S. 1956 applied to all persons "within the limits of Alaska territory or in the waters thereof"; and The White Act of 1924, to be discussed *infra* pp. 27-34 applied to "any of the waters over which the United States has jurisdiction."

The fact that the Alien Fishing Act was enforced in the disputed portion of Cook Inlet was confirmed by former enforcement personnel of the United States. The testimony of Albert Day, former Director of the United States Fish and Wildlife Service, clearly discloses that all of Cook Inlet landward of a line from Cape Douglas through the Barren Islands to Point Gore was water of Alaska under the jurisdiction of the United States from which aliens were excluded. Mr. Day testified that it was his policy not to permit foreign fishing within the three-mile limit which he described on Exhibit 1 to his deposition:

(State Ex. F-O; Tr. 359)

"Q. All right. But as to your interpretation of the regulations and the three-mile limit with respect to Cook Inlet, you have testified that you would have measured the three-mile limit and you did during your administration from the red line drawn on this map? [The line extended from Cape Douglas through the Barren Islands to Point Gore]

A. That is correct, to the best of my recollection.

Q. Now, with respect to foreign fishing activities in Cook Inlet, while you were Director, would it have been your policy to permit foreign vessels to fish within the red line drawn on that deposition Exhibit 1?

A. No, it would not."

(A. 274-275; R. Day's Depos. p. 16)

Donald Erickson, who was an enforcement officer in Cook Inlet in 1941 testified explicitly with reference to the Alien Fishing Act:

"Q. When you were in the Washington, D.C. office, did you formulate or was there formulated any

policy, concerning foreign fishing activities in Cook Inlet?

A. Well, there was really basically no policy to formulate. It was against the law, for an alien to fish in the waters of Alaska.

* * *

Q. When you referred to Cook Inlet, in your statement regarding the alien fishing, what areas of Cook Inlet did you refer to?

A. Well, the whole thing. The description of it is Cape Douglas to Point Gore, including the Barren Islands. We prepared charts, showing those designations."

(A. 289-290; R. Erickson's Dep. p. 11-13, incl.)

Don Roberts, who was responsible for the management and enforcement of the fisheries in Cook Inlet in 1954, testified as follows:

"Q. When you say 'the regulations would prohibit it,' what do you rely on in making that statement?

A. Well, back in there you are talking about 18, 19 or 20 years ago here, but somewhere in here, I don't think it would be too hard to find, there is an alien—a prohibition against foreign vessels or alien vessels fishing in Alaskan waters, and if they had been in Cook Inlet as described in the regulations—* * *

A. . . . if there had been any vessels in Cook Inlet as described by the regulations, we would have apprehended them because it prohibited the taking of fish from this area by foreign vessels." (A. 77; Tr. 319-320)

Fred Headlee, who was responsible for the enforcement of United States fisheries laws in Cook Inlet in 1944 and 1945, gave similar testimony. (A. 80-81; Tr. 340)

(c) The Southwestern Alaska Fisheries Reservation.

The intensity of sovereignty exercised by the United States over Cook Inlet increased in direct proportion to the increased concern of the United States over Cook Inlet's fisheries. Hence, the geographic area of Alaska in which Cook Inlet is located was singled out for special treatment in 1922. In that year President Harding, by Executive Order, created the Southwestern Alaska Fisheries Reservation. The regulations under that Order defined the Cook Inlet area as that area " . . . north of the latitude of Cape Douglas . . . including the Barren Islands . . . and all the shores and waters of Cook Inlet." (State Ex. 22; Tr. 89) As to those waters, the Presidential Order admonished:

> "Warning is hereby given to all unauthorized persons not to fish in or use any of the waters herein described or mentioned." (State Ex. 21, Tr. 89)

That warning struck home on May 27, 1924 when two American halibut vessels, the ZAPORA and NEW ENGLAND were arrested and boarded by an enforcement agent of the United States for fishing in the disputed area of Cook Inlet without first obtaining the required authority. Clearly from the period beginning in 1892 to the ZAPORA and NEW ENGLAND boardings in 1924, the United States had treated all of Cook Inlet's waters as its own and had exercised sovereignty therein. (Findings 35-39) (Pet. App. C, pp. 29a-30a)

(d) The White Act.

In 1924 Congress passed the "Act for the Protection of the Fisheries of Alaska and for Other Purposes" (herein-

after referred to as The White Act), 43 Stat. 464. That Act, which was passed in response to a severe menace to Alaska's fish resources (State Ex. AK; Tr. 394), was the successful culmination of the United States' efforts in achieving complete and exclusive sovereignty over Cook Inlet. The Secretary of Commerce and later the Secretary of the Interior were given authority to "set apart and reserve fishing areas in any of the waters over which the United States has jurisdiction." Here again the Executive Branch of the Government was called upon to determine whether or not all of the waters of Cook Inlet were included within "the waters of Alaska over which the United States has jurisdiction." Again, the United States acted clearly and unmistakably.

The Secretary of Commerce and later the Secretary of the Interior, from 1924 to 1959, a period of 35 years, defined the waters over which the United States has jurisdiction ". . . *to include Cook Inlet,* its tributary waters and all adjoining waters north of Cape Douglas and west of Point Gore. The Barren Islands are included." (Emphasis supplied) (Laws and Regulations for the Protection of Fisheries of Alaska, Department of Commerce, December, 1924; State Ex. IU; Tr. 322; Findings 42, 44; Pet. App. C, pp. 30a-31a)

As previously noted, the United States has argued that this regulation should be narrowly construed and that all the waters of Cook Inlet should not be included, but only the "territorial and coastal" waters extending three miles from the shoreline of Cook Inlet. The Government's argument is an unnecessarily narrow interpretation of the regulation and unsupported by both its plain meaning and other uncontradicted evidence.

First, unlike Cook Inlet, other areas of Alaska pertaining to bays, such as Bristol Bay and Resurrection Bay, were defined so as to restrict any claim of jurisdiction to "territorial, coastal and tributary waters."[11] The absence of those words in the definition of Cook Inlet, contrasted with the inclusion of the words "to include Cook Inlet . . . and all adjoining waters north of Cape Douglas, etc." makes unmistakably clear the meaning of the regulation in question. In fact, we suggest that, if today the author of the regulations were given the chore of asserting United States sovereignty over Cook Inlet, he would have difficulty in finding clearer and more precise words than the words used in the definition of the Cook Inlet area.[12] At no point in the presentation of this case, either in the District Court, the Court of Appeals or this Court, have the Government attorneys been able to suggest how more clearly and expressly jurisdiction could have been asserted over all of Cook Inlet than the definition contained in the aforesaid regulation.

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11. The United States argues that other areas of Alaska were treated in a manner similar to Cook Inlet, namely the Yukon-Kuskokwim and Resurrection Bay areas. Alaska respectfully disagrees. The applicable regulations define those areas in terms of territorial, coastal and tributary waters. Moreover, the regulations defining the Aleutian Islands area refer to territorial, coastal and tributary waters. The regulation defining the Kodiak area does not include specifically Shelikof Strait. With respect to the regulation defining the Bering River-Yakataga area, the Government is not clear as to what areas of high seas its claims included. A reading of the regulation does not disclose any such area. Be that as it may, the fact remains that without exception the only area defined under The White Act from 1924 through 1956 without reference to "territorial, coastal and tributary waters" was the Cook Inlet area. (State Ex. IU; Tr. 322)

12. In fact, the Government's principal witness at trial, Howard Beltzo, was unable to devise a definition expressing United States jurisdiction over Cook Inlet with more clarity than the one in effect from 1924-1956. (A. 33; Tr. 202)

Secondly, numerous witnesses testified that officials of the United States Bureau of Fisheries and its successor agencies regularly and continuously patrol the whole Cook Inlet area as defined in the regulations for the purpose of enforcing The White Act. Excerpts from this testimony have been heretofore quoted, particularly the testimony of Albert Day.[13]

This testimony is not inconsistent with Day's memorandum cited in the Government's brief. (Govt. brief p. 14) The key question, of course, is where is the baseline to be drawn from which the three miles seaward is to be extended. Obviously, it would be unlawful to enforce The White Act beyond the three-mile limit which, according to Mr. Day, was measured from the Cape Douglas, Barren Island, Point Gore line. And then, as the Chief Counsel suggested, Mr. Day testified that The White Act was to be enforced in the entire area of Cook Inlet as defined by the regulations.[14] The full significance of Mr. Day's testimony is brought home by a reference to that portion of the Chief Counsel's memorandum which the Government's attorney saw fit to omit. The Government closed its quotation of the memorandum with a reference to the proposition that the Alaska Commercial Fisheries Acts and "their application to citizens *may be* quite different from that involved in their application to foreign vessels" but then the memorandum continues with this most significant language:

> "It is doubted that the reference is intended to be strictly construed. In any event, one of the means by

13. The testimony of other witnesses indicating enforcement of The White Act and its regulations over all of Cook Inlet appears at pages 31-47 of Alaska's Post Trial Brief (R. 362a-364b)

14. (A. 271-273; Day's Depos. pp. 10-13, incl.)

> which a historic base status may be established is to claim jurisdiction at least over the citizens of this country in such waters."[15] (State Ex. BQ; Tr. 360)

The Government attempts to refute on several grounds the fact that the United States exercised sovereignty over Cook Inlet by virtue of its statutes, regulations and acts governing fisheries. None of the Government's arguments will withstand close scrutiny.

The Government attempts to detract from the character of the statutes and regulations by arguing that they involved only the regulation of fishing. (Pet. Br., p. 41) As will be demonstrated hereunder, *infra* p. 41 the regulation of fishing is the most common method of asserting a claim to inland water.

Then the Government argues (Pet. Br. p. 43) that the enforcement was done pursuant to the authority of a nation to enforce fishery laws against its nationals on the high seas, *Skiriotes v. Florida*, 313 U.S. 69 (1941). However, the Government fails to perceive two crucial distinctions. First, the testimony of all the witnesses, and the regulations themselves treated Cook Inlet as waters of Alaska, not high seas, and second, The White Act, unlike the Florida statute in *Skiriotes*, was by its terms limited to waters of Alaska over which the United States has jurisdiction and not expressly expanded to include the high seas.

15. In a subsequent memorandum dated May 8, 1953, from Dan H. Ralston, the Fish and Wildlife Service Law Enforcement Supervisor in Juneau to his agents in Cordova and Anchorage, the Day memorandum referred to is enclosed. Mr. Ralston said in part: "I am not in complete agreement with counsel regarding Cook Inlet, as it is my opinion that this Inlet is and has been historically claimed as territorial waters." (State Ex. BQ; Tr. 360)

Along the same line, the Government argues that the enforcement activity was carried on pursuant to various treaties under which the United States may enforce laws against its citizens on the high seas. The basis for such a statement is wholly without support in the record and again contradicts the testimony as well as the plain language of the statute and regulations. Lastly, along the same line, the Government argues that the patrols, boardings and arrests were carried out in Cook Inlet to solely enforce the landing law. In making this argument the Government ignores the fact that none of the arrests were based on a violation of the landing law. (Findings 49-54; 70-71; Pet. App. C, pp. 33a-34a; 38a-39a)[16]

Finally, the Government argues (Pet. Br. pp. 48-51) that the acts upon which Alaska relies were not "notorious" and that Alaska uses subtle and elaborate arguments to reach the conclusion that sovereignty was exercised over Cook Inlet. It is hard to find subtlety in the *Kodiak* decision, The White Act and regulations defining Cook Inlet and other areas, and in the clear testimony of the various witnesses. The United States ignores the fact that the regulations were printed by the hundreds and thou-

16. The uncontradicted testimony of Donald M. Stewart, Management Biologist in Cook Inlet for the Alaska Department of Fish and Game, clearly refutes the Government's assertion. Mr. Stewart testified that a disastrous depletion of the salmon stock would occur if the fish and game regulations had not applied throughout all of Cook Inlet. He further testified:

"Q. . . . now would your answer be the same, and would the disastrous effect occur if instead of no regulations at all being applicable to the center part of the water, but the landing law was in effect?

A. Again, in my opinion the effects should be the same.

Q. Yes, sir, notwithstanding the landing laws?

A. Right."

(A. 142; Tr. 588)

sands and distributed to fishermen (A. 80; Tr. 339) as well as to officials of foreign nations, including Japan and Canada. (A. 163-164; Tr. 643-644) Additionally, as will be demonstrated hereunder, the nations most likely to be interested in Cook Inlet, Canada and Japan, were made aware of the claims of the United States—Canada by being furnished the Gharrett-Scudder lines (*supra* pp. 34-36, 46); and Japan through the arrest of its vessels in Shelikof Strait after transiting Cook Inlet (*supra* pp. 37-39). Thus the District Court had no alternative but to find that the jurisdiction of the United States over Cook Inlet was open and apparent. And the success with which the enforcement was carried out and the extent of its notoriety is shown by the fact that except for a few isolated Canadian halibut fishermen, no foreigners fished in or attempted to fish in Cook Inlet.[17] Moreover, the evidence clearly showed that when the occasion arose, in addition to numerous boardings[18] in the disputed area, those found in violation of the laws were arrested and where necessary,

17. The exclusivity of the American fishery in Cook Inlet was recognized when in October of 1930 the Commissioner of Commerce ordered certain charts destroyed which depicted portion of Cook Inlet as high seas. In his letter dated October 20, 1930, the Secretary of Commerce wrote:

"In my opinion, the designation on this chart of territorial waters and high seas may prove exceedingly harmful and detrimental to American fisheries industry. In spite of the statement that the chart has no official sanction or significance in respect to what constitutes high seas or territorial waters, it seems to me that it is, in effect, *an invitation to foreign fishery interests to invade waters which heretofore have always been considered as open only to nationals of the United States.*" (State Ex. AR; Tr. 366) (Emphasis supplied)

18. A high-ranking United States official testified that such boardings are acts of enforcement and constitute a serious occasion. (Baltzo Testimony, A. 19; Tr. 176)

their vessels and gear were confiscated.[19] (Findings 40-57; Pet. App. C, pp. 30a-35a; see particularly Findings 45-56; Pet. App. C, pp. 31a-35a)

(e) The Gharrett-Scudder line.

One of the United States' most significant assertions of authority over all of Cook Inlet took place in 1957 and 1958 when the United States communicated to Canada, in a classic manner, its claim to Cook Inlet. In order to delineate the waters of Alaska from the high seas, in 1957 the Department of the Interior promulgated a regulation defining the waters of Alaska as all those waters north and west of the international boundary at Dixon Entrance extending " . . . *3 miles seaward* (1) from the coast, (2) *from lines extending from headland to headland across all bays,* inlets, straits, passes, sounds and entrances." (50 C.F.R. §101.19 (1957)) (Emphasis added)[20] In 1957 Canada and the United States also proposed the prohibition of the taking of salmon with nets from the high seas. Because of this proposal Canada requested the United States to furnish it charts depicting the location of the line described in the above-quoted regulation. The United States responded and on or about October 15, 1957, sent to the Canadian Government

19. The United States argues that since most of the charges which formed the basis of the arrests were dismissed, there was no exercise of authority. However, any dismissals were in all instances based upon a failure to prove the merits of the charge and not based upon a lack of jurisdiction.

20. This definition was intended to codify by regulation the description of waters in which the Alaska fishing regulations had applied. (State Ex. EX; Tr. 409) Of particular significance is the reference to the three-mile limit. This is a concept solely applicable with reference to the definition of the location of the territorial sea. (See Naab Deposition No. 2; pp. 97-99; A. 440-442)

charts depicting the line, thereafter known as the Gharrett-Scudder line. The Gharrett-Scudder line, which was depicted as *the baseline for the measurement of the territorial sea* for fishery regulation, enclosed as inland waters all of the disputed area of Cook Inlet. As will be shown hereunder, Canada did not contest or oppose the claim made to Cook Inlet. (Findings 58-63; Pet. App. C, pp. 35a-37a) The Gharrett-Scudder line and the regulations upon which it was based, confirm as of the date of Alaska Statehood, the status of Cook Inlet as inland waters of the United States.

In attempting to derogate from the significance of the United States' claim to Cook Inlet through the transmission of the Gharrett-Scudder line charts to Canada, the Government states at pages 16-17 of its brief:

> "The United States transmitted charts reflecting the Gharrett-Scudder line . . . to Canada accompanied by a disclaimer stating that they were not intended to enlarge or extend territorial waters in a legal and jurisdictional sense."

This, we submit, is not an accurate statement of the facts. To the contrary, the letter from the Second Secretary of the United States Embassy in Ottawa to Mr. G. R. Clark, Deputy Ministry of Fisheries of Canada, dated October 15, 1957 (State Ex. JF; Tr. 701) reads as follows:

> "In connection with the above regulations [regulations defining the waters of Alaska] I am pleased to transmit two sets of charts of the North Pacific Ocean off Alaska showing lines upon which the area of the regulation of July 25, 1957 is based. The charts were prepared by the Fish and Wild Life Service of the Department of the Interior."

Even if the United States had indicated that the charts were not intended to enlarge or extend territorial waters of Alaska, the result is the same. Since, as demonstrated in other parts of this brief, all of Cook Inlet had for many years been treated as waters of Alaska under the jurisdiction of the United States, the Gharrett-Scudder charts merely confirmed that fact.

In a further attempt to derogate from the significance of the Gharrett-Scudder charts the Government argues there is no evidence the charts were communicated to countries other than Canada. The record is clear that the one country having the most interest in Cook Inlet area was Canada. The record is devoid of any evidence that vessels of any nation other than Canada had appeared in the Cook Inlet area at or prior to the time of the drafting and transmitting of the Gharrett-Scudder charts. The interest of Canada was even negligible as indicated by the fact, uncontested by the evidence, and now admitted by the United States, that up to the time of the transmittal of the charts there were possibly only two undetected occurrences of Canadian halibut vessels fishing in Cook Inlet. (Finding 101; Pet. App. C, pp. 44a-45a)

4. Exercise of Sovereignty by Alaska.

The District Court found on the basis of undisputed evidence that after the State of Alaska took over control of its own commercial fisheries on January 1, 1960, it asserted continuous authority over the fisheries in Cook Inlet in the same manner as done by the United States since the arrest of the KODIAK in 1892. Alaska continued in effect substantially the same definition of the Cook Inlet area and distributed regulations containing that definition to authorities of the United States and

representatives of Japan, Canada and other foreign nations. No objection was ever received concerning the definition. The Court found that officials of the State have regularly and continuously patrolled all of Cook Inlet for the purpose of enforcing State fishing laws, and that when violations of the laws occurred, arrests were made.[21] (Findings 64-72; Pet. App. C, pp. 37a-39a)

The vigor with which Alaska pursued its claim to Cook Inlet is perhaps nowhere better demonstrated than in the Shelikof Strait incident, an incident which the District Court characterized as the clearest exercise of sovereignty by the State. On or about April 15, 1962, Alaskan fishery enforcement officials arrested three Japanese fishing vessels, one of which was more than three miles from shore in Shelikof Strait. The arrest was one event in a train of events involving the Japanese with Cook Inlet.

A Japanese fishing vessel, BANSHU MARU, and two other fishing vessels, had intruded into the southernmost part of lower Cook Inlet near the Barren Islands and then immediately proceeded into the nearby waters of Shelikof Strait. Having been forewarned that such Japanese fishing vessels intended to intrude into those waters to establish historic Japanese fishing rights therein, the Governor of Alaska, after seeking in vain to obtain immediate action by our State Department,[22] authorized the

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21. Contrary to the statement contained in the Government's brief (Pet. Br. p. 20) two non-residents were prosecuted in 1970 not for violation of a landing law, but for fishing in a closed area. The defendants were notified of the violation, not when "they landed in Alaska", but by enforcement aircraft flying over the area where the defendants were fishing. (A. 165-173; Tr. 660-674)

22. On a prior occasion, the United States informed Alaska that in cases of foreign fishing in Alaskan waters, the State should take appropriate action itself. (Finding 76; Pet. App. C, p. 40a)

arrest of three Japanese vessel captains and the boarding of two Japanese fishing vessels, at least one of which was more than three miles from Alaska's shores. The District Court has dealt at length with this incident in its Findings of Fact. (Findings 73-85, incl.; Pet. App. C, pp. 39a-42a) These Findings need not be repeated here. It is significant to note, however, that they are not in dispute and show clearly beyond doubt the most vivid exercise of sovereignty against foreigners. There was evidence that, with the knowledge of the Government of Japan[23] (notwithstanding its subsequent protest), the Japanese fishing company agreed in writing with Alaska thereafter not to fish in any part of the disputed area of Cook Inlet. Since then no such fishing by any Japanese citizen or vessel has taken place in Cook Inlet, although fishing has subsequently occurred elsewhere in the vicinity of Alaska.

The United States itself, even though given the opportunity to do so, did not dispute Alaska's action in claiming Cook Inlet. On May 3, 1962 the Japanese Government protested to the United States the arrests and boardings in Shelikof Strait, and the fact that the Japanese fishing company agreed not to fish in Cook Inlet.

Despite the Japanese protest and despite a contrary suggestion made by a lawyer for the State Department, the official reply of the United States did not state that either Cook Inlet or Shelikof Strait was international waters. To the contrary, the United States' reply said that the matter included questions of fact and law for the courts,

23. Ishimura Testimony, A-60; Tr. 273: "Q. Mr. Ishimura, you were then aware, were you not, that the Japanese Government was consulted by your company about this agreement . . . ? A. Of course, yes . . ."

presumably questions of law and fact similar to the case at bar. The incident closed by a statement by the President of the United States to the Governor of Alaska that Alaska did the right thing in seizing the Japanese vessels and enforcing Alaska's jurisdiction. (Findings 73-85; Pet. App. C, pp. 39a-42a)

On the basis of the factual record discussed above, there can be no doubt that the courts below correctly found that the United States and Alaska have consistently exercised authority over all the waters of Cook Inlet landward of the line joining Port Gore, Cape Douglas and the Barren Islands. The evidence on the issue of sovereignty is unrefuted, uncontradicted, and clearly not conflicting. For that reason, as the following portion of this brief will demonstrate, the Judgment, Findings and Conclusions of the District Court, as well as the opinion of the Court of Appeals should be upheld.

B. LEGAL PRINCIPLES PERTAINING TO SOVEREIGNTY

The courts below concluded and each party agrees that the authority which a nation must exercise over bays in order to claim them as historic waters is *sovereignty*. *Juridical Regime of Historic Waters, Including Historic Bays,* United Nations Secretariat A/CN, 4/143 (1962) 85. (Hereafter referred to as *Juridical Regime*) The fundamental question in this suit is whether the acts upon which the courts below relied as establishing sovereignty over Cook Inlet were legally sufficient.

The issue framed in terms of the contentions of the Government is simple, and Alaska believes, easily answered. The Government points out, and correctly so,

that most of the enforcement activities and arrests in Cook Inlet involved American citizens. Hence the Government argues that

> ". . . neither the internal governmental regulations of the United States and the States nor actions pursuant to them against American citizens can be relied upon as exercises of sovereignty. Only actual enforcement actions directed against foreign citizens or foreign governments can be considered in this regard." (Pet. Br. p. 35)

The Government's argument is insufficient and faulty in several respects.

First, the document upon which both parties and the Courts rely, the *Juridical Regime* imposes no such requirement. To the contrary, the text writers in that document universally agree that there is no inflexible rule as to what acts constitute sovereignty. Hence one writer, Gidel, in discussing the acts by which authority is exercised, stated:

> "It is hard to specify categorically what kind of acts of appropriation constitute sufficient evidence: the exclusion from these areas of foreign vessels or their subjection to rules imposed by the coastal State which exceed the normal scope of regulations made in the interests of navigation would obviously be acts affording convincing evidence of the State's intent. *It would, however, be too strict to insist that only such acts constitute evidence.* In the Grisbadarna dispute between Sweden and Norway, the judgment of 23 October 1909 mentions that 'Sweden has performed various acts . . . owing to her conviction that these regions were Swedish, as, for instance, the placing of beacons, the measurement of the sea,

> and the installation of a light-boat, being acts which involved considerable expense and in doing which she not only thought that she was exercising her right but even more than she was performing her duty.' " *Juridical Regime* 89. (Emphasis supplied)

The following answer by Norway in the Fisheries case (*United Kingdom v. Norway,* Judgment of 18 December, 1951) to the question of how sovereignty is asserted was quoted with approval by the authors of the *Juridical Regime:*

> "Above all, by action under municipal law (laws, regulations, administrative measures, judicial decisions, etc.)" *Juridical Regime* 93.

Bourquin, another writer, agreed and stated:

> "What acts under municipal law can be cited as expressing its desire to act as the sovereign? That is a matter very difficult, if not impossible, to determine *a priori.* There are some acts which are manifestly not open to any misunderstanding in this regard. The State which forbids foreign ships to penetrate the bay or to fish therein indisputably demonstrates by such action its desire to act as the sovereign." *Juridical Regime* 90.

A careful review of the *Juridical Regime* discloses only one inflexible requirement for sovereignty—that the exercise of sovereignty be effective. The *Juridical Regime* states:

> "On this point there is full agreement in theory and practice. Bourquin expresses the general opinion in these words:

> 'Sovereignty must be effectively exercised; the intent of the State must be expressed by deeds and not merely by proclamations.'
>
> This does not, however, imply that the State necessarily must have undertaken concrete action to enforce its relevant laws and regulations within or with respect to the area claimed. It is not impossible that those laws and regulations were respected without the State having to resort to particular acts of enforcement. It is, however, essential that to extent that actions on the part of the State and its organs are necessary to maintain authority over the area, such action was undertaken." *Juridical Regime* 98-99.

Clearly Alaska's evidence meets the test set forth in the above-quoted portions of the *Juridical Regime,* an authority admitted by the United States to be controlling in this case. This is true for the following reasons.

First, consistent with the requirement that sovereignty must be effectively exercised, the courts below acted properly in taking into account the absence of foreign vessels in Cook Inlet over the period of time involved. It goes without saying that enforcement activity in Cook Inlet cannot be undertaken against vessels unless they intruded therein. The courts below also properly relied upon the testimony of law enforcement officers who testified that, had they discovered foreign fishing or trespassing in Cook Inlet, they would have acted in such a way as to maintain effective authority over Cook Inlet. (For example, see Roberts' Testimony, A. 74-77; Tr. 315-320)

Second, the Government's argument is invalid because it overlooks the undisputed evidence that there was indeed enforcement activity and the exercise of United

States and Alaskan sovereignty against foreigners and foreign nations. Thus:

(1) Sovereignty was exercised against Japanese fishermen through the seizure of the BANSHU MARU and the subsequent agreement.

(2) The Gharrett-Scudder line was submitted to Canada—a line clearly including Cook Inlet landward of the baseline for determining the three-mile limit disclosed on the charts.

(3) The publication and distribution of federal laws and regulations banning aliens from fishing in Cook Inlet.

(4) The openness, notoriety and continuity of both federal and state patrols that had continued uninterruptedly since 1906 and before, and since the creation of the Southwestern Alaska Fisheries Reservation in 1922.

In face of the above, the Government overlooks the complete absence of any type of protest (except the repudiated Japanese note, p. 38, *supra)* by any foreign nation against the continued exercise of sovereignty over Cook Inlet. Summarizing, the lower court resolved the factual issues and then properly applied the principles of law established by prior decisions of this Court.

PART TWO

CONTINUITY OF EXERCISE OF SOVEREIGNTY

A. FACTUAL FINDINGS

The first 85 Findings of Fact by the District Court dealt in the main with exercise of sovereignty. The next 6 Findings went to the issue of continuity, illustrative of which is Finding 86.

"The exercise of sovereignty over Cook Inlet, the nature of which is indicated in the foregoing Findings, has continued for such period of time as to have developed into a usage. (Record as a whole)"

The Government agrees with these findings and accordingly, in its brief there is, with one exception, no significant comment on any alleged lack of continuity. Apparently the Government is conceding that if sovereignty was in fact exercised, it was sufficiently continuous to have developed into a usage.

The one exception is the Government's contention that continuity was "interrupted . . . by the periodic incursions of foreign vessels who fished unmolested in Cook Inlet." (Govt. brief pp. 25-26) We have already dealt with this contention and the uncontradicted findings of the lower court to the contrary.

One further observation may be in order. Alaska presented the testimony of two eminent and qualified historians, DeArmond and Hunt, who are completely ignored in the Government's brief. Dr. William Hunt, then Chairman of the History Department of the University of Alaska, after having qualified as an expert witness, testified as follows:

"Q. Now, based on your training, experience, and those studies, do you have an opinion as to whether or not there has been a historical exercise of authority over Cook Inlet by those people who have inhabited its shores?
A. Yes, sir, I have.
Q. What is that opinion?

* * *

The Witness: Sir, my opinion is that there has been a historical exercise of control over Cook Inlet and its shores.

Q. Do you have an opinion, Dr. Hunt, based upon your training, experience, and those studies as to whether from a historical standpoint there has been such continuity of this exercise of authority as to have developed into a usage?
A. Yes, sir.
Q. What is that opinion, sir?
A. I believe there has been such a continued exercise of authority as to have ripened into a usage." (A. 98; Tr. 479-483)

He proceeded at length to give factual reasons in support of these conclusions. (A. 98-113; Tr. 483-508) Similar testimony was given by Robert DeArmond, an equally renowned expert on Alaska's history. (A. 113-134; Tr. 520-560)

B. LEGAL PRINCIPLES WITH REGARD TO CONTINUITY

Alaska's evidence on usage and the District Court's findings based thereon meet the legal test imposed to establish continuity. The *Juridical Regime* requires that the "exercise of authority [must be] continued for times sufficient to confer upon it the quality of usage, . . ." *Juridical Regime* 100. While it is clear that no precise length of time is necessary to create a usage upon which historic title is based, "the State must have kept up its exercise of sovereignty over the area for a considerable time." *Juridical Regime* 103.

Applying this principle to the facts at hand, the Court held, as demonstrated by the evidence summarized above, that the exercise of authority over lower Cook Inlet "has existed without interruption from 1906 and very possibly earlier, until the time this dispute arose." (Op. p. 10; Pet. App. B, p. 17a)

PART THREE

FOREIGN NATIONS HAVE ACQUIESCED IN THE EXERCISE OF SOVEREIGNTY

A. FACTUAL FINDINGS

The District Court made eleven Findings dealing with attitude of foreign nations with respect to the exercise of sovereignty over the disputed area of Cook Inlet. (Findings 92-102, incl.; Pet. App. C, pp. 43a-45a, incl.) Typical of these findings are:

> "Foreign nations have tolerated and acquiesced in such exercise of sovereignty over Cook Inlet. (Finding 92; Pet. App. C, p. 43a)
>
> * * *
>
> "Canada, the foreign nation which would be one of the most keenly interested countries in the status of Cook Inlet, accepted the placement of the Gharrett-Scudder line, hereinabove mentioned. (Terry's Depos. p. 13; Findings 58-63; Finding 95; Pet. App. C, p. 43a)
>
> * * *
>
> "The exercise of authority over Cook Inlet by persons and states who controlled its shores has been notorious and well documented over a period of more than sixty-six years. (DeArmond's testimony, Tr. pp. 520-570) (Finding 97; Pet. App. C, p. 43a)
>
> * * *
>
> "The openness and notoriety of the claim over the disputed waters of Cook Inlet were such that all foreign nations knew or should have known of the claim. (Finding 98; Pet. App. C, p. 44a)
>
> Since the arrest of the BANSHU MARU there have been intrusions into other waters off the Alaskan coast by Japanese, Soviet, Korean and Canadian vessels; nevertheless, there have been no such documented intrusions into lower Cook Inlet, except as noted hereunder in Finding 100. (Gov. Egan's testimony, Tr. pp. 732, 746; Exhibits 118, EB) (Finding 99; Pet. App. C, p. 44a)
>
> * * *
>
> "The infrequent and isolated nature of Canadians—no other foreigners—fishing within the waters of Cook Inlet reinforces the view that Cook Inlet has been recognized by foreign nations as inland waters of Alaska and the United States." (Finding 102, Pet. App. C, p. 45a)

In addition to the foregoing, the District Court considered other factors which reinforce its finding that the presence of a few Canadian halibut vessels was not controlling on the status of Cook Inlet as a historic bay. First, the Court recognized that historic title to the disputed area had already ripened. Since most of the intrusions took place after the commencement of this suit and by that time the United States had engaged in the activity described in the Findings, the Court was clearly correct in deciding that historic title to Cook Inlet has already ripened in the United States and Alaska.

Second, the evidence showed and the Court found that in the event of a real challenge to American fishery jurisdiction in the disputed area, such as foreign fishing for salmon, the United States would have been quick to take enforcement action. (Finding 101, Pet. App. C, p. 44a; Baltzo testimony A. 24-25; Tr. 185-187)

Third, the Court found on the basis of undisputed evidence that there existed traditional ties of friendship be-

tween the United States and Canada. This factor, which is closely related to that of consent, recognized the past close relations between the two countries.[24] As an example of the close relationship existing between Canada and the United States, the District Court referred to the 1970 United States-Canada Reciprocal Fishing Agreement.[25] (State Ex. R; Tr. 404)

B. LEGAL PRINCIPLES PERTAINING TO THE ISSUE OF ACQUIESCENCE

The attitude of foreign nations, the last of the three factors to be considered in determining whether a nation has acquired historic title to a maritime area, has been described both as "acquiescence" and "toleration." *Juridical Regime* 106 and 109. For purposes of this case the distinction between the two terms is unimportant[26] since the lower court applied the higher standard and found that "the community of nations has acquiesced in the emergence of historic title of lower Cook Inlet." (Op. p. 11); Pet. App. B, p. 18a)[26a] The *Juridical Regime* quotes with approval an expert in the international law of bays,

24. An indication of this attitude is a letter from the Warden of the Bureau of Fisheries, Ketchikan Office, to the Bureau in Juneau, dated August 8, 1937, wherein the Warden wrote: "Release boats Stop Our policy to be lenient with Canadian boats fishing halibut close to boundary." (State Ex. DZ; Tr. 405)

25. That agreement was merely one in a long line of agreements between the United States and Canada dating back to 1782. (State Ex. BY; Tr. 402)

26. In discussing the distinction between toleration and acquiescence, *Juridical Regime* notes: "If acquiescence is a form of consent, acquiescence would amount to *recognition* of the sovereignty of the coastal state over the area in question and reliance on a historic title would be superfluous." *Juridical Regime* 107.

26a. Assuming that actions speak louder than words, the conclusion is inescapable that Japan has acquiesced in the claim to Cook Inlet.

Bourquin, who supports the theory that the attitude required of foreign nations is that of acquiescence:[27]

> "In such cases the question to be asked is not whether the other States consented to the claims of the coastal State but whether they interfered with the action of that State to the point of divesting of the two conditions required for the formation of an historic title.
> Obviously only acts of opposition can have that effect. So long as the behavior of the riparian State cause no protest abroad, the exercise of sovereignty continues unimpeded . . .
> The absence of any reaction by foreign States is sufficient." *Juridical Regime* 109.[28]

The Government's principal argument on the issue of acquiescence is that the claims of the United States and Alaska to Cook Inlet were not open and notorious. If, as the Government contends, the claims were not open and notorious, the Government reasons there was no opportunity for the nation affected to oppose the claims. The Government's argument is easily answered on several grounds. First, the District Court found that the claims upon Cook Inlet were open and notorious. (Finding 98;

27. The Government recognizes that the Courts below applied the standard of acquiescence. In circuituous reasoning however, the Government argues that the application of that standard by the Courts was meaningless since the acts upon which they relied as establishing sovereignty were legally insufficient. Since, as demonstrated in the earlier portions of this brief, the evidence clearly discloses an exercise of sovereignty, the only conclusion to draw from the Government's argument is that the Courts' application of the law with respect to acquiescence was correct.

28. This precedent has been recognized in cases of other historic bays in the United States. Thus Long Island Sound has been claimed as an historic bay by the United States with no apparent affirmative consent by foreign states. (Hodgson's Depos. pp. 54-56; A. 324-325)

Pet. App. C, p. 44a) This finding is clearly supported by the evidence discussed above, particularly with reference to Canada and Japan.

Second, all that is required with respect to the claim is that it be open and public. The *Juridical Regime* states:

> "It may be argued that if a State had a real interest in a maritime area, it would be natural for that State to follow closely what was going on there and that the fact that the State was unaware of the situation was a good indication that its interest in the area was slight or non-existent . . .
>
> In conclusion therefore, there seems to be strong reason to hold that notoriety of the exercise of sovereignty, in other words, open and public exercise of sovereignty, is required rather than actual knowledge by the foreign state of the activities of the coastal state in that area." *Juridical Regime* 129-130.

Against this background, the Government's argument will not stand up. The Court decision, statutes, regulations, proclamations, patrols, arrests and boardings were open and public. The transmission of the Gharrett-Scudder line to Canada was in addition, actual notice to Canada of the claim.[29]

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29. In applying the concept of acquiescence it is clear that an opposing nation must maintain its opposition to historic bay claim so long as the sovereignty of the claiming nation persists. A corollary to this rule is that in the face of continuing sovereignty, a simple and single protest such as the Japanese note, will not suffice. *Juridical Regime* 112-115. Moreover, to prevent the ripening of historic title, the opposing nation must have effectively expressed its opposition at the time the exercise of sovereignty became open and notorious. These principles have been approved by this Court in *United States v. California*, 381 U.S. 139, 172 (1965) and in *United States v. Louisiana*, 394 U.S. 11, 23 (1969).

Applying the foregoing principles to this case it is clear that the only conclusion available to the lower courts is the one they drew—that foreign nations have acquiesced in the United States' and Alaska's claims to Cook Inlet.

PART FOUR

ALL OF COOK INLET IS INLAND WATER —NOT TERRITORIAL SEA

In apparent recognition of the fact that Alaska proved clear beyond doubt that sovereignty was exercised over Cook Inlet for a sufficient period of time with the acquiescence of foreign nations, the Government retreats to its last and manifestly weak line of defense. The Government argues that at the most, Alaska proved Cook Inlet to be historic territorial sea rather than historic inland waters. As we understand it the Government's sole authority is a footnote reference by this Court in *Louisiana*, 394 U.S. at 24, n.28 to a quoted portion of the *Juridical Regime*.

> "Historic title can be obtained over territorial as well as inland waters, depending on the kind of jurisdiction exercised over the area. 'If the claimant State exercised sovereignty as over internal waters, the area claimed would be internal waters, and if the sovereignty exercised was sovereignty as over the territorial sea, the area would be territorial sea.' *Juridical Regime of Historic Waters, Including Historic Bays, supra*, n.27, at 23."

It is Alaska's contention that this portion of the *Juridical Regime*, as quoted by this Court, is taken out of context by the Government and has no reference to Cook Inlet. In *Louisiana*, this Court also said:

> "Whether particular waters are inland has depended on historical as well as geographical factors. Certain shoreline configurations have been deemed to confine bodies of water, such as bays, which are necessarily inland. But it has also been recognized *that other areas of water closely connected to the shore,* although they do not meet any precise geographical test, may have achieved the status of inland waters by the manner in which they have been treated by the coastal nation." 394 U.S. at 23. (Emphasis added)

In the *Juridical Regime,* we find the following statement which seems more applicable to the waters of Cook Inlet:

> ". . . the dominant opinion, as gathered from the statements assembled in the memorandum [*Historic Bays,* Memorandum by the Secretariat to the United Nations, Document A/Conf. 13/1] (Exhibit 52), seems to be that 'historic bays' the coasts of which belong to a single state are internal waters. This was to be expected considering that it is generally agreed that the waters inside the closing line of the bay are internal waters and that the territorial sea begins outside that line."
>
> (Par. 163, *Juridical Regime of Historic Waters, Including Historic Bays*)

And in the memorandum, *Historic Bays,* there is the following statement:

> "It is always necessary to remember in dealing with 'historic waters', the essential point that those waters are internal waters. This fact explains many aspects which would be otherwise difficult to grasp. The theory was originally evolved to apply to 'bays', and is still referred to as the theory of 'historic bays' because it was never envisaged that it might apply except in areas which, by reason of their configuration, are generally not used as major international routes of transit." P. 117, *Historic Bays,* Memorandum by the Secretariat to the United Nations, Document A/Conf. 13/1.

In the light of these international authorities it must be remembered that Article 7 of the Convention on the Territorial Sea and Contiguous Zone, prescribes rules solely for the purpose of defining the baseline for the measurement of territorial sea from a line drawn across the mouths of or within bays. Waters inside the defined line are inland waters. Accordingly, the only sensible meaning of Section 6 of Article 7 (the exception of historic bays) is that a baseline drawn across the bay's entrance points (more than 24 miles apart) also encloses inland waters, where the bay's geographical characteristics otherwise meet the requirements of Article 7 (the semi-circle test, etc.).

This Court's footnote reference to historic territorial seas, relied upon by the Government here, must have had application to "other areas of water closely connected to the shore" but not to "necessarily inland" waters. Such other waters could be straits or open seas and as to these a nation could conceivably have acquiesced title to them as historic territorial seas or even as historic inland waters. Such is not the case of Cook Inlet when its "historical as well as geographical factors" are taken into account. *Louisana Boundary* case, 394 U.S. at 23.

Further, a careful examination of the *Juridical Regime* will disclose no such requirement that historical inland bays can be established only by denying innocent passage to foreign vessels. Both the *Juridical Regime* and its predecessor, *Historic Bays,* Memorandum by the Secretariat to

the United Nations, Document A/Conf. 13/1 (State Ex. 52, Tr. 99), speak in terms of the type of acts required to manifest sovereignty over inland waters. Each treatise declines to denote one specifically required act of sovereignty.[30]

The Government states that "the record shows that foreign vessels were permitted to transit and stop in the disputed area of lower Cook Inlet, and indeed foreign vessels fished there at various times since the early 1940's without hindrance." (Govt. brief p. 24) The record shows no such thing and the Government, it is interesting to note, has cited no part of the record in support of the above-quoted statement.[31] All of the evidence is to the contrary.[32]

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30. In *United States v. Louisiana*, 394 U.S. 11, 17-35 (1969), this Court, following the principles of the *Juridical Regime*, found that the placement of an inland water line used for regulation of navigation along Louisiana's coast did not constitute sovereignty over inland waters. The Court did not state, as the Government would seem to require, that interference with the right of innocent passage is a fact which must be proved to support a claim of historic inland waters.

31. The Government's failure may possibly be explained by what happened in the Court of Appeals. In its brief there, the Government did cite portions of the testimony in support of a similar statement. We were able to demonstrate successfully, we believe, that the referenced testimony did not support the Government but proved Alaska's contentions. (Res. Br. in Opp., App. B, pp. 3B through 4B)

32. (1) Testimony of O'Dale who from 1901 to at least 1910 operated vessels and prospected in the Cook Inlet area. (A. 455-456) (2) Testimony of Studdert, Fishing Warden in Cook Inlet for two years including the year 1924, for the U. S. Bureau of Fisheries. (A. 545) (3) Testimony of Branson who from 1951 through 1953 was Alaska Enforcement Agent for the Cook Inlet District, Bureau of Commercial Fisheries. (A. 232) (4) Testimony of Wilson, Fisheries Management Enforcement Officer in Cook Inlet from 1955 through 1962. (A. 602) (5) Testimony of Skerry, Agent in Charge of the Cook Inlet District for the Bureau of Commercial Fisheries from 1955 through August, 1959. (A. 507)

We may concede, although the record is largely silent on the point, that Anchorage is and has been for many years the largest seaport in the State of Alaska and that foreign vessels can only reach Anchorage by passing through the waters of Cook Inlet. But this proves nothing, inasmuch as the interests of free international commerce have brought about an international custom that permits foreign vessels to travel across inland waters en route to harbors and ports. So the presence of a few foreign shipping vessels in Cook Inlet would constitute no more evidence that Cook Inlet is territorial sea than the presence of a thousand foreign shipping vessels in San Francisco Bay is evidence that San Francisco Bay is territorial sea. The presence of any foreign vessel in Cook Inlet is adequately explained by Colombos, *The International Law of the Sea* (6th Rev. Ed., (1967) pp. 87-88) wherein he stated:

> "Interior or national waters, on the other hand, consist of a state's harbours, ports and roadsteads and its internal gulfs and bays, straits, lakes and rivers. In these waters, apart from special conventions, foreign states cannot, as a matter of strict law, demand any rights for their vessels or subjects, although for reasons based on the interests of international commerce and navigation, it may be asserted that an international custom has grown in modern times that access of foreign vessels to these waters should not be refused except on compelling national grounds." See also *Award of the Tribunal*, North Atlantic Coast Fisheries Arbitration, September 7, 1910 (State Ex. S, p. 91; Tr. 382)

PART FIVE

THE COURTS CORRECTLY APPLIED THE PROPER STANDARD OF PROOF FOR THE ESTABLISHMENT OF THE ELEMENTS OF COOK INLET'S STATUS AS AN HISTORIC BAY

A. THE DISCLAIMERS

The Government, still clinging to its argument that the State failed to prove sovereignty over Cook Inlet—an argument with which we have dealt—would have this Court reverse the decision of the courts below because proper effect was not allegedly given to so-called disclaimers of historic title. The Government's position fails to take into account three factors, each of which independently proves the correctness of the lower court's decision.

Let us first consider exactly what the District Court did. In recognition of the Government's argument that a disclaimer would be decisive in cases where the historic evidence is not clear beyond doubt, the District Court said:

> "The final qualification concerns the quantum of proof required for a showing of historic title. The expression 'clear beyond doubt', as it first appeared in *United States v. California,* 381 U.S., at 175, could very well not have been intended by the Supreme Court to establish such a high standard of proof in all cases. The context in which that phrase appeared pertained to the legal effect of a disclaimer by the United States in the face of questionable evidence of historic title. The context of this case is clearly distinguishable. Further, there is other language in

> that case[33] which implies that no rigorous standard of proof is required to prove historic title. 381 U.S., at 174. Nor do the long respected commentators of international law appear to require a rigorous standard of proof. *Juridical Regime* 158. Despite this uncertainty over the burden of proof, this Court will adhere to the higher standard of proof, for the reason the Court finds the State of Alaska has satisfied the requirements for establishment of historic title even under the more rigorous standard." (P. 6, Opinion; Pet. App. B, p. 13a)

The line to be drawn between proof, on the one hand, that meets the preponderance standard, and proof, on the other hand, that attains the higher standard, is a line that is difficult to draw. In any event, the task of evaluating the evidence and of determining whether it meets the required degree of proof is necessarily the responsibility of the trial judge in the first instance. Here the Court could have, and with good reason, repudiated the higher standard. Instead, it accepted the Federal Government's position and imposed upon Alaska the burden of proving its case clear beyond doubt. We do not believe that this Court can or should ignore the findings of the Courts below in the absence of a finding that they are clearly erroneous. (Rule 52(a) Federal Rules of Civil Procedure).[34]

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33. The District Court was referring to the following language: ". . . it is said that the Special Master erroneously thought the concept of historic waters to be an exception to the general rule of inland waters requiring a rigorous standard of truth. We find no substantial indication of this in his report, *U. S. v. California,* 394 U.S. 139, 174 (1965).

34. In applying the "clearly erroneous" rule, the courts have reached the same conclusion where issues must be proved by "clear and convincing evidence." In *Re Mollans Estate,* 181 Minn. 217, 232 N.W. (1930), *Taylor v. Bunnell,* 133 Cal. App. 177, 23 P.2d 1062 (1933), *Christiansen v. Strand,* 81 S.D. 187, 130 N.W.2d 286 (1965).

B. FOREIGN RELATIONS

This brings us to a fundamental point—one consistently ignored by the Government. Its brief is replete with arguments that this case involves matters of foreign policy. The District Court was not unmindful of this argument and indeed recognized "that the conduct of foreign relations is constitutionally vested within the exclusive control of the Executive and Legislative Branches of the United States Government." (Concl. of Law 21, Pet. App. C, p. 52a) But the lower court also recognized that "courts have traditionally exercised jurisdiction to resolve fundamental law questions and basic fact issues between state and federal governments." (Concl. of Law 22, Pet. App. C, p. 52a) So the Federal Government's argument of exclusivity over foreign relations obviously does not lead to an abandonment of this Court's obligation to determine, as between the National Government and the State Government, the ownership of the mineral resources in Cook Inlet. Nor does it follow that all standards of appellate review are to be cast aside.

To the contrary, this Court in *Louisiana,* 394 U.S. at 77, held that the National Government cannot so distort its power over foreign relations as to deny the effect of past events and thereby reach an impermissible contraction of state territory.[35] A previous caution to like

35. "[I]t would be inequitable in adapting the principles of international law to the resolution of a domestic controversy, to permit the National Government to distort those principles, in the name of its power over foreign relations and external affairs, by denying any effect of past events.

In a footnote to that excerpt, the Court further limited the legal effect of a disclaimer:

> It is one thing to say that the United States should not be required to take the novel, affirmative step of adding to its territory by drawing straight baselines. It would be quite another to allow the United States to prevent recognition of a historic title which may already have ripened because of *past* events but which is called into question for the first time in a domestic lawsuit. The latter, we believe, would approach an impermissible contraction of territory against which we cautioned in *United States v. California.* Id."

effect had been sounded by the Court in *California,* 381 U.S. at 168.[36] The disclaimers, if they rise to the level of exercises of control over foreign relations, were all written after the occurrence of such past events as (1) the enactment and enforcement of federal legislation and regulations, protecting the fisheries of Alaska for American citizens; (2) the transmittal to and acceptance by the Canadian Government of the Gharrett-Scudder charts; (3) the seizure of the Japanese vessels, the State Department's subsequent repudiation of the Japanese protest, and the Japanese continuous adherence to date to its promise not to fish again in the waters of Cook Inlet.

It would be ironic and manifestly unfair indeed if Alaska would now, after more than 60 years of continuous sovereignty, lose Cook Inlet, its fisheries and its minerals, because one federal lawyer in one federal agency opined to another federal lawyer in another federal agency that the waters of Cook Inlet were and are high seas.

36. And in *United States v. California*, 381 U.S. at 168, the Court reasoned:

> "The national responsibility for conducting our international relations obviously must be accommodated with the legitimate interests of the States in the territory over which they are sovereign. Thus a contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable."

CONCLUSION

For the reasons discussed above, the judgments of the District Court and the Court of Appeals should be affirmed.

Respectfully submitted,

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March, 1975

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing BRIEF OF THE STATE OF ALASKA, RESPONDENT, has been forwarded to counsel for Petitioner, Robert H. Bork, Solicitor General; Wallace H. Johnson, Assistant Attorney General; A. Raymond Randolph, Jr., Deputy Solicitor General; Gerald P. Norton, Assistant to the Solicitor General, Office of the Solicitor General, Department of Justice, Washington, D. C. 20530, and to Mr. Bruce C. Rashkow, Attorney, Department of Justice and Edward F. Bradley, Attorney, Department of Justice, Washington, D.C. 20530 this _____ day of March, 1975, by placing the same in the United States mail, correctly addressed and stamped.

THOMAS M. PHILLIPS
Attorney for Respondent
State of Alaska